IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-264

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, and UNITED STATES OF AMERICA,

Petitioners,

v.

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

GILBERT H. WEIL
Counsel for Respondent
Bristol Laboratories
Division of Bristol-Myers Company
60 East 42nd Street
New York, New York 10165
(212) 687-8573

ROBERT L. SHERMAN
with him on the brief

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-264

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, and UNITED STATES OF AMERICA,

Petitioners,

v.

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Questions Presented

Under provisions in contracts between respondent ("Bristol")* and 1) the Defense Supply Agency of the Department of Defense, 2) the Veterans Administration (both agencies of the United States of America) reading in part respectively 1) "the Comptroller General and his representatives are entitled . . . to examine any books, documents, papers or records of [Bristol] that directly pertain to, and involve transactions relating to, the contract", and 2) "the Comptroller General . . . shall . . . have access to and the right to examine any directly pertinent books, documents, papers and records of [Bristol] . . . involving transactions relating to such contracts", and which provisions were authored and

---

* Bristol has no parent company and no affiliate.

required by the United States government,† must Bristol be deemed to have understood that it was giving the Comptroller General access to its records of costs which had not been factored into and had played no role in determining the prices in those contracts? Absent such an understanding, must Bristol grant the Comptroller General such access?

† 10 U.S.C. 2313(b) and 41 U.S.C. 254(c).

TABLE OF CONTENTS

PAGE

Statement 1

Summary of Argument 2

ARGUMENT—

I. Legislative history clearly manifests a parsimonious intent by congress with respect to access to records by the Comptroller General 3

II. The only books and records Bristol withholds from the Comptroller General are those concerning costs that did not enter into or affect determination of the prices in Bristol's contracts at issue in this case 5

III. Fundamental principles of contract law preclude the Comptroller General from the access to Bristol's records he now seeks 7

IV. Fundamental principles of statutory construction preclude the Comptroller General from the access to Bristol's records he now seeks 9

V. The government's arguments are unavailing 10

1) 31 U.S.C. 53(a) 11

2) Legislative history, and 11

3) The Comptroller General's interpretations 11

4) The government's bottom line theory 14

5) *Hewlett-Packard* and *Lilly* 17

PAGE

6) The *Federal Crop Insurance Corporation* v. *Merrill* line of decisions 19

7) 41 C.F.R. 20

CONCLUSION 22

TABLE OF AUTHORITIES

Cases:

De Matteo Construction Company v. *United States*, 600 F.2d 1384 (1979) 19n

Eli Lilly & Co. v. *Staats*, 574 F.2d 904 (7th Cir. 1978) 9n, 10, 11, 17, 18, 18n, 19

Federal Crop Insurance Corp. v. *Merrill*, 332 U.S. 380 (1947) 10, 19, 19n

G. L. Christian and Associates v. *United States*, 320 F.2d 345 (1963) 20n

Hewlett-Packard Co. v. *United States*, 385 F.2d 1013 (1967) 9n, 10, 14, 17, 18, 18n

Jackson v. *United States*, 573 F.2d 1189 (1978) 20n

Shea v. *Vilpando*, 416 U.S. 251 (1974) 9n

Tennessee Valley Authority v. *Hill*, 437 U.S. 153 (1978) 10

United States v. *Abbott Laboratories*, 597 F.2d 672 (1979) 18, 19

United States v. *Wunderlich*, 342 U.S. (1951) 20n

Statutes:

Armed Services Procurement Act of 1947 (10 U.S.C. 2313(b)) 3

PAGE

41 C.F.R. § 1-3.1220(b) 21n

41 C.F.R. § 1-3.1220(b)(7) 21n

41 C.F.R. § 1-3.1220(b)(11) 21n

41 C.F.R. § 1-3.1220(b)(24) 21n

41 C.F.R. § 1-15.201-4 21

41 C.F.R. § 1-15.205-35 21

41 C.F.R. § 3.1220(b)(14) 21n

Federal Property and Administrative Services Act of 1949 (41 U.S.C. 454(c)) 3

First War Powers Act of 1941 ..... 3, 4n

Pub.L. No. 81-921, ch. 1230, 64 Stat. 1257 (January 12, 1951) 3n

10 U.S.C. 2313(b) ..... iin, 2, 3

31 U.S.C. 53(a) 11

41 U.S.C. 254(c) 2, 3

Separate Legislative History:

96 Cong. Rec. 17042 ..... 3n

96 Cong. Rec. 17045 ..... 4n

96 Cong. Rec. 17122 ..... 3, 3n

96 Cong. Rec. 17123 3

97 Cong. Rec. 1246 3

97 Cong. Rec. 13198 3

97 Cong. Rec. 13376 4

97 Cong. Rec. 13377 ..... 5, 5n, 14, 14n

Senate Bill (S. 4266) 3

PAGE

Treatises:

Corbin on Contracts, §538, n.50 and §543, n.89 ..... 9n

Corbin on Contracts, §559 ..... 8n

Restatement of the Law, Contracts, §230 ..... 9n

Restatement of the Law, Contracts, §235(a) 7n

Restatement of the Law, Contracts, §236(d) 8n

Miscellaneous:

Note, *Eli Lilly & Co.* v. *Staats:* An Undue Expansion of the GAO's Investigatory Power Under the Access-To-Records Statutes. 74 Northwestern University Law Review 122, at 125-30 (1979) 9n

Webster's Seventh New Collegiate Dictionary (G. & C. Merriam Company, 1972) 7n

The Illustrated Heritage Dictionary and Information Book (Houghton Mifflin Company, 1977) 7n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-264

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, and UNITED STATES OF AMERICA,

Petitioners,

v.

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

Statement

Although, as page 5 of the government's brief ("G.B.") states, Bristol originally rejected the Comptroller General's demand for access to "records relating to the methodology and decisions involved in the firm's establishment of prices . . . (J.A. 69)", Bristol changed that position and agreed to provide these records during this case.[1]

---

[1] In its memorandum in support of its first motion for summary judgment (dated July 22, 1975), Bristol stated in a footnote to page 5, "[it] does not dispute defendant's right to access to and examination of those documents identified in answers . . . 2(c) . . . to plaintiff's first set of interrogatories." Answer 2(c) had identified the "methodology and decisions" documents. J.A. 17.

Summary of Argument

It is manifest in the legislative history of 10 U.S.C. 2313 (b) and 41 U.S.C. 254(c)[2] that congress intended to be more miserly than generous in the authority contemplated thereunder for the Comptroller General.

That history does not explicate why congress adopted so unusual an approach as to require that the authority be created by contracts between sellers and federal agencies rather than simply doing so by legislative fiat. But, given that basic contract principles differ from those for construing statutory grants of administrative agency power, it must be inferred that congress meant to invoke rules that characteristically govern contracts; and they are consonant with a more restrictive than expansive legislative intent regarding the Comptroller General's access-to-records rights.

Under black letter law of contracts, the words "directly pertain to", "directly pertinent" and "involve [or "involving"] transactions relating [or "related"] to" must be given the meaning they have to reasonable business men in their ordinary usage. So construed and applied, they would not define records of costs that do not *directly* (indeed, not at all) enter into ("pertain to") determining the contracts' prices, and that are not directly involved in them, or directly related thereto.

Even under principles of statutory construction, documents and records that have nothing to do with setting the contract prices cannot be embraced as "directly" pertinent to, or involved in or related to, such contracts or to transactions relating to them.

---

[2] Quoted at G.B. 1-2. Sometimes referred to hereinafter as the "Hardy amendment(s)".

ARGUMENT

I.

Legislative history clearly manifests a parsimonious intent by congress with respect to access to records by the Comptroller General.

The first statutory appearance of a clause such as those involved here was in an amendment[3] to the First War Powers Act of 1941.[3a] The primary purpose of that amendment was to enable renegotiation of contracts for the supply of commodities to the armed forces.[4] A Hardy amendment was added to the bill (S. 4266) on January 2, 1951 (96 Cong. Rec. 17122-23). It did not contain the word "directly" to modify "pertinent". Ibid.

At the next congressional session, Congressman Hardy, explaining he had not earlier realized that other laws besides the First War Powers Act of 1941 were appropriate beneficiaries for his amendment (97 Cong. Rec. 13198, col. 1, October 15, 1951), proposed similar amendments to the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 454(c)) and the Armed Services Procurement Act of 1947 (10 U.S.C. 2313(b)), the sections now before this Court. 97 Cong. Rec. 1246 (February 12, 1951).

It was during the October 15, 1951 debate in the House that two clear manifestations appeared of congressional disinclination to be liberal with access-to-records privileges for the Comptroller General. The first is at the end of 97 Cong. Rec. 13198. It serves notice that congress advisedly differentiated between statutory power and contractual permission.

---

[3] Pub.L. No. 81-921, ch. 1230, 64 Stat. 1257 (January 12, 1951).

[3a] 50 U.S.C. App. § 611, 55 Stat. 838, *repealed*, Pub.L. 89-544, § 8(a), 80 Stat. 651, (September 6, 1966).

[4] 96 Cong. Rec. 17042 et seq. (January 1, 1951) and 96 Cong. Rec. 17122 et seq. (January 2, 1951).

> MR. EBERHARTER. * * * * Now, I would like to ask one question: Does this refer to contracts that have been made in the past?
>
> MR. HARDY. It could not refer to contracts that have been made in the past, because it requires the insertion of a clause in contracts.
>
> MR. EBERHARTER. I see. I notice that you give power to the Comptroller General.
>
> MR. HARDY. It does not give him power to inspect the books and records, but requires that a clause be inserted in the contracts permitting him to inspect.[5]

Congressman Hardy reiterated this distinction in the subsequent session, emphasizing that the Comptroller General's right of access "is given him in the contract. The right is not given him in the bill." Idem at 13376.

There are three possible explanations of why congress adopted the unusual approach of having the Comptroller General's right-to-access be created by contractual permission rather than by statutory fiat. It either considered that doing so would give him a) broader rights, or b) narrower rights or c) make no difference at all. It could hardly have been the first. To infer the last would charge congress with a meaningless differentiation. The second—especially in context with other harmonious clues—seems the most likely.

---

[5] Significantly, at one point in the House debate on Congressman Hardy's earlier amendment to the First War Powers Act of 1941, he had been questioned as to why his amendment did not give more power to the Comptroller General than simply to inspect books and records. He answered, "We are reenacting what was weak in this respect, and my purpose is to try and strengthen it so that we will at least get our foot in the door, and the Congress will have an opportunity to observe intimately just what takes place in these renegotiations. I would like to see the amendment provide greater control, but I have been unable to work out stronger wording without burdening the bill in such a way that it would be unworkable by the Departments." 96 Cong. Rec. 17045 (January 1, 1951).

At 97 Cong. Rec. 13377 (October 17, 1951), Congressman Hoffman (Michigan) proposed that the Hardy amendment be amended by inserting the word "directly" immediately before the word "pertinent". His intent was clear from his contextual comments.[6] Mr. Hardy stated, "I have no objection to the [Hoffman] amendment"; and his own, with Mr. Hoffman's added, was adopted. Ibid.

II.

The only books and records Bristol withholds from the Comptroller General are those concerning costs that did not enter into or affect determination of the prices in Bristol's contracts at issue in this case.

Since Bristol has agreed to make available to the government records relating to its production costs for the items covered by the contracts in issue, Bristol, unlike the *amici*, did not raise the broader question whether *any* cost records can be deemed directly pertinent to contracts which were not negotiated on the basis of the contractor's costs. Rather,

---

[6] "Down into his place of business—and there has never been any trouble there and there is not now—come the investigators for the Labor Department, the War Labor Board fellows, and then, how they go into it, I do not know, but a fellow from the internal revenue agency and one from the Food and Drug Agency, now think of it, on one item of business that went through that plant and are the Government's men impudent, arrogant, and arbitrary? Ask the owner. Now they just take the company's time, and when you multiply that by thousands or hundreds of thousands of instances—and they can be multiplied that way—you can see how necessary and vital production is slowed. We do not want, we do not need, any more *snoopers* going around bothering the honest, patriotic citizens who are engaged in production to carry on the war. * * * * When does an agency not have someone on its staff who has, in his own mind, reason to suspect? Is there any agency which does not have some who think it their duty to suspect, to *snoop*, to show their authority. * * * * The purpose is to limit the 'snooping' that may be carried on under this bill which we do not have the votes to defeat." 97 Cong. Rec. 13377; emphasis supplied.

only the more limited question of the direct pertinence of certain categories of other costs—research and development, marketing and promotion, and distribution and administration costs—is presented here.

Bristol does not factor into its prices to the government, or, for that matter, even to its private vendees (including wholesalers),[7] any allowances for research and development expenses, marketing and promotion expenses, or those for general distribution and administration.[8] Yet, the government maintains that such costs "directly pertain to, and involve transactions relating to" the prices set in such government contracts.

Bristol sets its contract prices in the manner we shall detail immediately below, but decides what it can afford to spend on the above activities out of past and anticipated over-all revenues. (E.g., J.A. 132.) In short, it cuts the pattern of its research and development, marketing and promotional, distribution and administrative expenses to fit the cloth of its revenues, rather than weave revenue cloth to cover a desired pattern for such activities.

Bristol's contract prices are functions of its 1) manufacturing costs, such as raw and packaging materials, labor and fringe benefits, quality control and supervision; 2) manufacturing overhead, such as plant administration, production planning, warehousing, utilities and securities; 3) royalty expense; and, 4) in a general way, the cost of delivery to the sites specified in the contract. J.A. 107-08. Bristol would also probably consider competitive products

---

[7] G.B. 33 n.17, 34 n.19. J.A. 133.

[8] J.A. 108, 126-27, 131-32. Bristol's accounting system does not identify any costs by groupings, by products, by classes of customers, or by government versus non-government contracts. J.A. 121-23, 129.

on pricing, and possibly look at other related products within its own division, their costs and prices. J.A. 120.[9]

The manufacturing costs referred to above are "standard" or "estimated" manufacturing costs (J.A. 120); that is, an estimate is made in August or September of a year as to what Bristol's raw material, packaging materials, labor, machinery costs and factory overhead costs are expected to be in the ensuing year. J.A. 122.[10] Differences between such forecast costs and ones actually incurred later are, for post hoc accounting purposes, aggregated as variances; they are not assigned, or allocated, to any particular products, sales or customers. J.A. 121-22, 125-26, 128-29.

III.

Fundamental principles of contract law preclude the Comptroller General from the access to Bristol's records he now seeks.

1. Unless a contrary intent by all parties is clearly shown, words in a contract are to be given their ordinary meaning.[11]

"[D]irectly" meaning "in a direct manner",[12] and "direct" meaning "characterized by close logical, causal or consequential relationship";[13] and "pertain" meaning "to belong

---

[9] Also: J.A. 133-34, 137-38.

[10] "The estimate is based on what we expect that product to cost it in the year that it would be produced, the average cost during that year. Past history in some cases would be a factor in determining some of the components of that estimated cost." Ibid. Also: J.A. 121, 125.

[11] Restatement of the Law, Contracts, § 235(a).

[12] Webster's Seventh New Collegiate Dictionary, page 236 (G. & C. Merriam Company, 1972).

[13] Idem, page 235. "Without anyone or anything intervening; immediately." The Illustrated Heritage Dictionary and Information Book (Houghton Mifflin Company, 1977).

as a part, member, accessory or product . . . to belong as an attribute, feature, or function",[14] the combinations "directly pertain to" and "directly pertinent" mean, by their ordinary usage, that the cost records sought by the Comptroller General must, if he is to succeed, bear an integral relationship to the contracts at issue. That understanding, on which the parties to the contract are entitled to rely and to which they must be bound,[15] is augmented by the further explicit provisions that such costs must "involve transactions relating [or related] to" such contracts.

2. If there were any ambiguity inherent in the above-quoted contractual terms, it would have to be resolved against the Comptroller General, for the government is the contracting party that drafted and imposed them.[16]

In sum, as held by the courts below (Pet. App. 10a-11a):

> Although the access to records clause has its origins in statute, it is nevertheless a contractual provision. We are thus confronted with the task of construing the contracts, a task which turns on the intent and understanding of the parties regarding the import of the access to records clause at the time the contracts were entered. The government's position is particularly unrealistic when viewed in this light. It is inconceivable that Bristol, or any contracting firm, could have understood this clause to authorize the sweeping power of inspection claimed by the GAO. As a matter of contractual construction, the government's argument falls of its own weight.

---

[14] Webster's supra, at page 631.

[15] District Court opinion, Pet. App. 10a-11a, aff'd., idem 3a.

[16] Restatement of the Law, Contracts, § 236(d); Corbin on Contracts, § 559.

3. Once bound to the terms of a contract, no party can by unilateral declaration alter them to its own benefit,[17] the very situation here (see G.B. 23-28).[18] While Bristol has not felt it necessary to rely upon the Comptroller General's attempt to employ his asserted right of access abusively, as have *amici*,[19] it can point out how incompatible such a motivation is with the congressional abhorrence toward his anticipated snooping that led to incorporation of "directly" into the statute (supra, page 5 at n.6).

IV.

Fundamental principles of statutory construction preclude the Comptroller General from the access to Bristol's records he now seeks.

To reverse the decisions of the courts below would require determination that despite congressional intention that the Hardy amendment not open the door to governmental snooping (supra, page 5 at n.6), that despite its intention not to "burden" the legislation with more than a restricted

---

[17] Restatement of the Law, Contracts, § 230; Corbin on Contracts, § 538, n.50 and § 543, n.89.

[18] This governmental exercise is futile in any event. While agency interpretation of an ambiguous *statutory* (in contrast to a contractual) grant of authority may be entitled to judicial respect, even that does not apply where the language of the statute is clear, for to hold otherwise would defeat the legislative function. *Shea* v. *Vilpando*, 416 U.S. 251, 262, n. 11 (1974). The government attempts to hurdle this obstacle by enlisting the *Hewlett-Packard* decision as an implicit provision in its procurement contracts (G.B. 37). That avails it naught, for *Hewlett-Packard* dealt only with production costs, not with those of the quite different kind now in issue. Infra, pages 17-18.

[19] Reflected in *Eli Lilly & Co.* v. *Staats*, 574 F.2d 904, at 909-10 and (dissenting judge) 918-19 (7th Cir. 1978); Note, *Eli Lilly & Co.* v. *Staats:* An Undue Expansion of the GAO's Investigatory Power Under the Access-To-Records Statutes. 74 Northwestern University Law Review 122, at 125-30 (1979).

access right for the Comptroller General (supra, page 4, n.5), that despite its intention not to confer statutory power upon the Comptroller General but only to allow him such rights as the law of contracts permits (supra, pages 3-4), congress did intend to vest him with power to examine virtually every book and record of any firm entering into a supply contract with the government.[20]

Unless convinced that such was truly the legislative intent, this Court is, we respectfully submit, bound to affirm the decisions of the lower courts. *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, esp. 194-95 (1978).

V.

The government's arguments are unavailing.

The government's contentions run along seven lines. It relies upon: 1) 31 U.S.C. 53(a) (G.B. 8-9, 13, 23); 2) legislative history of the Hardy amendment (G.B. 9-11, 15-19, 30); 3) the Comptroller General's own interpretation of the Hardy amendment (G.B. 10, 23-28); 4) a bottom line theory, i.e., that because Bristol's expenditures for research and development, marketing and promotion, general distribution and administration must ultimately be met out of its total revenues, whatever their sources, and because payments by the government under the contracts involved here contributed to such total revenues, those costs must be deemed "directly pertinent to" and "involved in" such contracts (G.B. 34); 5) the *Hewlett-Packard* and *Lilly* decisions (G.B. 20, 30-31, 34-35); 6) a line of decisions exemplified by *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 383-85 (G.B. 37); and, 7) sections of 41 C.F.R. (G.B. 35-36). These will be dealt with in that order.

---

[20] District Court opinion, Pet. App. 9a-10a; adopted by Court of Appeals, idem at 3a; and infra, page 15, n.26.

1) 31 U.S.C. 53(a).

Not until this last, desperate moment has the government bethought itself to rely on this provision as *deus ex machina*. All through the proceedings in the district court, all through the court of appeals proceeding, even in its petition for a writ of certiorari herein, the government had evidently believed 31 U.S.C. 53(a) to be inapplicable.[21]

Plainly, that belief was shared by congress when it enacted the Hardy amendment. It is not to be presumed that congress was ignorant of the already existing section 53(a), or that it intended to indulge in mere redundancy. Congress could have had only one of two purposes in enacting the Hardy amendments: either to fill a gap left by section 53(a) (which would make it inapplicable here), or to cut back its authorization of the Comptroller General to the more restrictive limits of direct pertinency prescribed by the Hardy amendments. In either event, it is the contractual provisions specified by those amendments that control; they are specific, contrasted with section 53(a)'s generality, and they postdate it.

2) Legislative history, and

3) The Comptroller General's interpretations.

Legislative history supports Bristol's position rather than the government's (supra, pages 3-5) as do the Comptroller General's expressions (G.B. 23-28). The references specifically relied upon by the government demonstrate that congress intended by the Hardy amendments to protect the government against improprieties in the negotiation of government procurement contracts.

---

[21] In *Lilly*, although, as here, the Comptroller General had initially made a boilerplate reference to 31 U.S.C. 53 and 67 (J.A. 38), the government rejected the sections under the test of litigation. 574 F.2d at 910.

Even if, as the government contends, the access clauses were intended to permit the Comptroller General to assess the reasonableness of Bristol's prices, Bristol's omission from its computation of prices to the government of any allowance for the costs at issue could not contribute to waste, extravagance, excessiveness, unreasonableness or impropriety in its prices;[22] quite the contrary. Excluding particular cost items from the computation of prices can only lower them. It would be only the increasing of prices to the government by adding such costs to their base that could raise questions as to excessiveness, waste, unreasonableness, unfairness or impropriety.

No harm can be done to the Comptroller General's asserted interest to monitor the reasonableness of Bristol's prices to the government if data concerning such expenses remain unavailable to him. Inquiry by the Comptroller General into costs that have been excluded as pricing factors, on an unsubstantiated assertion that they are somehow "directly pertinent" to the transactions at bar, could only enhance, not impugn, the fairness of Bristol's prices. Absent reliance upon such costs as justification, Bristol's prices to the government stand in their poorest light of reasonableness. If the Comptroller General might find additional expenditures that could have been assigned to the subject transactions, but were not, that would only make Bristol's prices more reasonable and fair by reducing its gross profit on them. One may doubt that the Comptroller General's interest is in demonstrating that contractors' prices are less excessive and more protective of the government's interests (supra) than they facially seem, due to failure to assign properly allocable costs to their validation.

---

[22] Even the Comptroller General's own interpretations upon which the government relies, would, at most, go no further than access to protect against such improprieties as these. G.B. 11, 16, 20-25, 27, 30-31, 33, 34 and their pertinent footnotes.

The statement by General Counsel of GAO, Robert Keller, Esq. (G.B. 26) speaks only to his perceived need for the agency to obtain "cost data to support price proposals and quotations". Bristol's withheld costs were not additions in reaching its contract prices. Data concerning them are, therefore, not necessary, or even pertinent, "to support" their "proposals and quotations".

In like vein is the statement of GAO's Assistant General Counsel, Paul Shnitzer, Esq. (G.B. 27-28). Even under his expansive interpretation, he makes clear that only the "costs . . . actually incurred in the performance of the contract", and those "generated in the performance of that contract . . . how much it cost him to perform that contract" define the appropriate area of concern for the Comptroller General to access a contractor's records. Bristol's expenses for research and development, marketing and promotion, and distribution and administration were not "incurred in the performance of the contract[s]" at issue here, were not "generated in [their] performance", and were not costs in order for Bristol "to perform those contracts" (supra, pages 6-7).[23] They would be incurred and generated regardless of the contracts in issue here. E.g., J.A. 131-32.

Apart from that, the government's own references to statements by Representatives Harvey and Hoffman demonstrate that even they, with their fears of governmental snooping, did not perceive the Hardy amendments, even

---

[23] Even if Mr. Keller were correct in stating "that GAO could 'go beyond direct manufacturing costs' into such areas as 'how research costs are allocated as between the Government contract and commercial business' " (G.B. 26), that information has already been supplied to the Comptroller General by Bristol: namely, there is no such allocation in setting prices to either government or non-government customers, such pricing being posited primarily upon standard manufacturing costs, manufacturing overhead, royalty expense, competition, and the costs and prices for other of Bristol's related products (supra, pages 6-7). That such, and such alone, are the "directly pertinent" costs is further confirmed by regulations cited by the government itself (infra, page 21).

before addition of the restricting modifier "directly", as extending to unallocated costs (G.B. 18).[24]

In light of *Hewlett-Packard's* holding having not dealt with the costs involved in Bristol's refusal of access to the Comptroller General (infra, pages 17-18), and of the legislative and GAO's own concern having been focused on improper pricing (supra, pages 11-12), a concern which cannot be frustrated by such denial of access (supra, page 12), the government's contention that Bristol should be bound by its contracts to grant the access (G.B. 37) rings hollowly.

It may well be noted that Representative Hardy undertook to assuage the trepidations of the supporters of the Harvey amendment by stating, "I tried to state this many times, that we are not anticipating that the General Accounting Office could possibly go into all of these things, but they would have the right to do it if they had any reason to suspect fraud or bad faith or illegality." (97 Cong. Rec. at 13377, col. 2.) No such "reason to suspect" has been suggested by the government here.

4) The government's bottom line theory.

Undoubtedly, to remain solvent Bristol must over some span of time ultimately recover from total revenues its total expenses. So, too, must every business enterprise. "[D]irectly", and even "pertain", in the Hardy amendments would be sterile in meaning if because of that Bristol's out-

[24] It was undoubtedly their concern, and that of the other representatives who voted for the Harvey amendment (97 Cong. Rec. at 13377), that led to the *subsequent* proposal and adoption of Representative Hoffman's amendment adding "directly" to constrict "pertinent". The strength of their concern, of which Representative Hardy was certainly well aware, negates that adding "directly" was intended not to "sharply narrow[ ] the scope of inquiry to be allowed the GAO" simply because he agreed so readily to including it (G.B. 19).

lays for research and development,[25] advertising and promotion, and general administration and distribution were to be deemed "directly pertinent to" and related to the contracts at issue here, despite the fact that Bristol did not include any costs of such "transactions" in its formulation of the prices for such contracts. Congress might just as well have written that the Comptroller General should have access to records of every "transaction" impacting upon the profit and loss statements and balance sheets of every contractor supplying federal agencies.[26]

---

[25] Research and development expenses are not allocated to particular products for good reason. They do not relate to products that are currently being sold, but rather involve *projects* that may *or may not* develop into products sometime in the future. J.A. 131-32.

[26] "The United States insists that the GAO may inspect Bristol's records with respect to any and all costs met in whole or in part from revenues earned on the federal contracts, whether or not those costs are specifically assigned by Bristol to the contracts or the products delivered. According to the government the test is simply 'whether the burden of [the] costs is borne by the Government in the prices it must pay for the contract items.' . . . . The Government's theory has far reaching implications. The only items excludable from the Comptroller General's reach would be those, if any, which relate to the costs recovered exclusively from non-government contracts. . . . It is undisputed, however, that Bristol does not separately compute the cost of government and non-government contracts or pay for them out of separate funds. Accordingly, there are no excludable records under the Government's theory. . . . If the government's interpretation of the access to records clause is correct, Bristol will be required to make available virtually all of its books and records, because although it is impossible to trace the use of government dollars, those dollars contribute to the fund from which all of the company's expenses are paid.

Such a result would be inconsistent with the language of the access to records clause and the statutes pursuant to which the clause was included in the contracts. . . . It is a distortion of the language to argue that it permits GAO officials to discover virtually everything there is to know about the structure of the contractors' business. The reasonable assumption is that if Congress had wished to condition the receipt of a fixed-price negotiated contract on the contractors' agreement to allow such unusual and unfettered government inspection of their business records, it would have done so explicitly." Lower court decisions, Pet. App. 9a-10a, 3a.

An equivocal word invades the government's brief, confusing its arguments: "allocate".[27] There are two places in Bristol's operation at which allocation of costs can take place. The first is pre-contract, where certain costs are employed in the negotiating process as factors in determining the price to be charged in the contract; records of such costs would be directly pertinent to such contracts, and Bristol has granted the Comptroller General access to them. The second spot, however, is in Bristol's post hoc accounting procedure, whereby it retrospectively analyzes its financial circumstances and the relationships of its various activities in them.

The government's confusion of these different kinds of allocation underlies its assertion that Bristol cannot affect the Comptroller General's right to access by its own choice of accounting methods.[28] We agree; but that cuts both ways. As Bristol's accounting methods cannot detract from the Comptroller General's right of access, neither can they add to it.

The government's argument might be valid "[i]f respondent had fully allocated its costs" to *arrive at* the prices charged in its contracts at issue; then GAO's right of access might be clear. G.B. 33. But a post hoc accountancy allocation of cost items that played no role in arriving at the contract prices, not being "directly perti-

---

[27] E.g., G.B. 33-36.

[28] ". . . [T]he government cannot be bound by the accounting method respondent has established for its own purposes. . . . If respondent had fully allocated its costs, GAO's right to conduct an inspection adequate to evaluate the reasonableness of the contract price would be clear. No different outcome is warranted simply because respondent has chosen to allocate only some of its costs to particular contracts or products. Indeed, the logical consequence of the court of appeals' decision is that respondent would not be obliged to open any of its books to the Comptroller General if, for internal bookkeeping purposes, it chose to allocate none of its costs to a particular contract or product." G.B. 33.

nent" to setting them, would not give rise to a right to access he did not otherwise have.

In any event, Bristol did not make even such post hoc accounting allocations to the government contracts at issue of the transactional costs involved here.[29]

5) *Hewlett-Packard* and *Lilly*.

Bristol has from the outset agreed to provide the Comptroller General with cost records of the type *Hewlett-Packard* ruled upon; namely "costs of direct material, direct labor and overhead costs in producing the items furnished under the contracts" (385 F.2d at 1015), "the cost of producing the items furnished by Hewlett-Packard Company under the aforesaid contracts, including costs of direct material, direct labor and overhead costs." (idem at 1016), and "[p]roduction costs . . . in obtaining the materials, labor, facilities and the like required by [Hewlett-Packard] in fulfilling its commitment with reference to the subject matter of the contract." Ibid. That case did not rule upon the kinds of costs Bristol, and the lower court, assert lie beyond the Comptroller General's right of access: namely, research and development, advertising and promotion, and, in general, administration and distributional costs that Bristol has not utilized to compute its prices to the government.

Nonetheless, the government relies upon an unsubstantiated declaration in *Lilly* that *Hewlett-Packard* established a broad reading of the "directly pertinent" phrase, broad enough to encompass the types of costs that *Hewlett-Packard* never discussed or ruled upon. 574 F.2d at 913. The *Lilly* court offers no identification of such a "broad reading", satisfying itself solely with its *ipse dixit*.[30] The

---

[29] J.A. 113, 122-24, 126-32, 136-37, 139-40.

[30] The *Lilly* court's own "reading" of "directly pertinent" turns upon a criterion that finds no support in either the history or the

broadness of *Hewlett-Packard*'s reading was no more than that even though, in that case, production costs were not taken into consideration in fixing the contract prices (catalog prices were used), they "directly pertain to [the contract's] subject matter, because if such *production* costs were out of line with the contract price, the contract may have been an inappropriate means of meeting this particular procurement need of the Government." 385 F.2d at 1016; emphasis supplied. Whether or not the *Hewlett-Packard* decision was correct, Bristol has not sought to withhold production costs records from the Comptroller General. G.B. 5.

In essence, the *Lilly* majority accepted the government's bottom line theory. Under it there would appear to be no expense in the total firm picture that would be merely pertinent; none that could be pertinent without being "directly" pertinent. In effect, it would read the Hoffman amendment out of the Hardy amendments.

It is no wonder that no more than a year later two of the three judges in *United States* v. *Abbott Laboratories*, 597 F.2d 672 made clear that they would have decided *Lilly* the other way, and that they held as they did in *Abbott* only because of the constraint of *stare decisis*. Idem at 674-75. One of those judges (Judge Pell) had been the dissenting judge in *Lilly*, 574 F.2d at 918-19. In *Abbott* he reiterated his opinion that "[t]he Comptroller General, giving what I regard as a fair reading to his demands, goes

---

language of the Hardy amendments, and certainly not in *Hewlett-Packard;* namely, the ratio of production to non-production costs. Idem at 913-14. Such a rationale would presumably entitle the Comptroller General to access all a firm's expenses so as to satisfy himself as to what the relativity is between the two types of costs in all its operations, governmental and non-governmental. Thus, there would be no record to which his scrutiny could be barred if the *Lilly* rationalization is to be credited.

far beyond 'directly pertinent books, documents, papers, and records.'" 597 F.2d at 675.

Thus, a change of but one judge on the *Lilly* panel could well have resulted in an opposite decision, hence in *Abbott* as well, which would have left no diversity among circuits regarding the kinds of costs, and their lack of incorporation into pricing formulations, to support granting the writ of certiorari herein. Pet. App. 8-9. However viewed, the *Lilly* majority's rationalization is watery support for the government's position here.

6) The *Federal Crop Insurance Corporation* v. *Merrill* line of decisions.

These cases hold simply that a validly enacted administrative regulation, promulgated within delegated authority, conditions the terms of a contract entered into by that agency, even though not explicitly incorporated in it. All parties are bound; the governmental agent cannot vary it, and the private contractor cannot deny knowledge of its existence or controlling effect.[31] The within case involves

---

[31] "Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority." *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380 at 384. "As such regulations were issued pursuant to statutory authority (39 U.S.C. §401), they have the force and effect of law, and, if they are applicable, they must be deemed terms of the contract even if not specifically set out therein, knowledge of which is charged to the contractor." *De Matteo Construction Company* v. *United States*, 600 F.2d 1384 at 1391. "It is well settled that Regulations of an Executive Department have the force and effect of law. [Citation.] The law in effect when a Government contract is made becomes a part of the contract. . . . Consequently, these

no issue as to the binding effect upon a contracting party of a duly authorized and promulgated administrative regulation. There is no such regulation.

This case is governed by explicit clauses in the contracts at issue. They were enacted by the congress, not promulgated by the Comptroller General. The issue here is only as to the meaning to be given such provisions, and their consequent enforcement upon the government as well as upon Bristol. The Comptroller General has not been authorized unilaterally to vary them either within the contracts themselves or externally by regulation; much less by self-serving declarations "interpreting" them.

7) 41 C.F.R.

Equally fruitless is the government's implication of Federal Procurement Regulations. The 41 C.F.R. 1-3. series does no more than codify definitions for certain terms as used in standards for cost accounting.[32] Except to the

---

Regulations were a part of the plaintiff's enlistment contract and required him . . . [etc.]". *Jackson* v. *United States,* 573 F.2d 1189 at 1194. "[W]e hold that, in the procurement field as in others, an authorized regulation can impose such peremptory requirements on federal officials and those who seek to enter into transactions with the Government." *G. L. Christian and Associates* v. *United States,* 320 F.2d 345 at 351. *United States* v. *Wunderlich,* 342 U.S. 98, held only that a party entering into a contract with the government and agreeing to a clause that granted the latter arbitral powers for the settlement of any dispute was bound to that commitment and could not complain about any decision made by the government absent a finding of fraud. "Respondents were not compelled or coerced into making the contract. It was a voluntary undertaking on their part. As competent parties they have contracted for the settlement of disputes in an arbitral manner. This, we have said in [citation], Congress has left them free to do. [Citation.] The limitation upon this arbitral process is fraud, placed there by this Court." Idem at 100.

[32] "Definitions promulgated by the Cost Accounting Standards Board are set forth herein. Unless the text of a particular stan-

extent that a definition may carry with it substantive consequences, the series 1-3. regulations have no law-making intendment. Insofar as 41 C.F.R. 1-15.201-4 and 1-15.205-35 are concerned, they allow, but do not require, contractors to allocate certain indirect costs in arriving at a price to the government. They do not apply where the contractor elects not to do so; hence have no bearing here.[33]

If anything, the Federal Procurement Regulations lean in Bristol's direction, rather than the government's, by clearly distinguishing between direct and indirect kinds of costs (analog: "directly pertinent" versus "indirectly pertinent").[34]

---

dard demands a different definition or the definition is expressly modified for a particular standard, terms defined herein whenever used in any standard shall have the meanings ascribed to them in this paragraph (b)." 41 C.F.R. §1-3.1220(b).

[33] 41 C.F.R. §1-3.1220(b)(24) defines *"Pricing"* as "The process of establishing the amount or amounts to be paid in return for goods or services." Bristol elected not to include its costs for the activities now at issue in "establishing the amount or amounts to be paid in return for [its] goods". Not being involved in the pricing, they are, therefore, not directly pertinent to it.

[34] *"Direct cost. . . .* Costs identified specifically with a contract are direct costs of that contract. All costs identified specifically with other final cost objectives of the contractor are direct costs of those cost objectives." 41 C.F.R. §1-3.1220(b)(7). *"Final cost objective.* A cost objective which has allocated to it both direct and indirect costs, and, in the contractor's accumulation system, is one of the final accumulation points." Idem §1-3.1220(b)(11). *"Indirect Cost.* Any cost not directly identified with a single final cost objective, but identified with two or more final cost objectives or with at least one intermediate cost objective." Idem §3.1220(b)(14) (The very kinds of costs in controversy here!).

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

GILBERT H. WEIL
Counsel for Bristol Laboratories
Division of Bristol-Myers Company

ROBERT L. SHERMAN
with him on the brief

March, 1981